ELLISON, SCHNEIDER & HARRIS L.L.P

CHRISTOPHER T. ELLISON
ANNE J. SCHNEIDER
JEFFERY D. HARRIS
DOUGLAS K. KERNER

ATTORNEYS AT LAW
2015 H STREET
SACRAMENTO, CALIFORNIA 95814-3109
TELEPHONE (916) 447-2166 FAX (916) 447-3512

BARBARA A. BRENNER
ANDREW B. BROWN
ROBERT E. DONLAN
LYNN M. HAUG
JASON MILLER
CHRISTOPHER M. SANDERS
GREGGORY L. WHEATLAND

May 15, 2002

Commissioner Robert A. Laurie, Presiding Member
Commissioner Robert Pernell, Associate Member
Energy and Infrastructure and Licensing Committee
California Energy Commission
1516 9th Street
Sacramento, CA 95814

Re: Comments of Duke Energy North America: Docket 02-SIT-1

Dear Commissioners Laurie and Pernell:

Duke Energy North America ("DENA") is pleased to have the opportunity to comment on the Rulemaking to Modify Rules of Practice and Procedure for Powerplant Applications (Docket 02-SIT-1). DENA thanks the Committee for its hard work in this proceeding to date and looks forward to continuing to work with the Committee on the proposed regulations.

The Committee heard the oral comment of DENA at the May 1, 2002 hearing, a very productive and informative workshop. As discussed at the workshop, DENA believes that Section 1720.3 should remain in place unchanged. The five year period for the initiation of construction is in place precisely because it reflects a reasonable timeframe for the initiation of construction. DENA respectfully requests that the Committee not shorten the deadline for the initiation of construction of projects. Given the uncertainty in California energy markets, now is not the time to change the timeframe for power plant construction.

- **The Current Five Year Timeframe Is Anything But Arbitrary; To The Contrary, The Current Scheme Reflects A Rational, Well-Reasoned Approach**. As discussed in detail below, DENA respectfully suggests that the current five year provision was put in place by the Commission precisely to reflect the realities of administrative and legal challenges to Commission certified projects. Simply put the long lead times associated with judicial and administrative appeals coupled with the time required for detailed engineering and equipment procurement reflect a measured and well-reasoned basis for the 5 year time frame in the existing regulation.

- **The Five Year Timeframe Reflects A Reasonable Period Of Time For All Legal And Administrative Appeals Of The Commission's Decision And The Related Permits That Must Be In Place For Construction And Commercial Operation**. As Commissioner Pernell noted, the appeal of a project's license may take years; or, it may

not. No one can know with certainty whether administrative appeals and lawsuits will follow a project for days, weeks, months, or years after certification. The existing five year timeframe recognizes the potential for protracted litigation without the threat of license revocation. A developer proceeds at risk during the pendancy of any administrative or judicial appeals. Until a permit is issued and judicial and administrative appeals are exhausted, the applicant does not with know certainty what they will be allowed to build and operate, and the applicant cannot be expected to expend greater resources for engineering and equipment. It is simply contrary to sound public policy and fundamental due process to put into a regulation a mandatory finding that (1) notwithstanding a developer's proceeding at risk during pending administrative and judicial challenges (2) the developer's license is subject to revocation.[1]

- **The Threatened Revocation Of Licenses Contributes To The Political Environment That Has Undermined Development Of Projects**. Current market instability coupled with the politically charged atmosphere in the State of California are the two factors that have contributed most to the uncertainty regarding new powerplant construction. Unfortunately, this Rulemaking contributes to the political uncertainty that affects a decision to invest the time, money, and resources required for the development of the powerplants that California needs and desires.

- **There Is Absolutely No Evidence Supporting The Conclusion That A Threat Of License Revocation Will Speed Up Construction Of Projects**. It is counterintuitive to suggest that more powerplant projects will be built if more powerplant licenses are revoked. A license revocation results in just that, a revoked license, and nothing else. The Committee should not act in the absence of an administrative record supporting position that revocation will speed up construction of licensed projects.

- **In Addition To Adverse Impacts On Certified Projects, The New Threat Of License Revocation Could Have A Chilling Affect On New Applications For Certification**. Development of a powerplant project is an expensive, multi-year process. The Committee should be concerned that placing new restrictions on the shelf life of a powerplant license adds additional risk that may cause developers to reexamine plans to file new applications for certification. In short, the proposed revisions to Section 1720.3 exacerbate the current uncertainty by having a chilling effect on new applications for certification.

- **Revocation Threatens The Substantial Commitment Of Resources Expended By The State In Licensing The Project**. By the time a project is licensed, the State of California and the developer have both invested substantial resources in the licensing

[1] DENA has not offered at this time specific changes to the Staff's proposed language because DENA believes that the major policy issues set forth in these comments should be the focus of the Committee's deliberations. DENA does not here, however, that one fundamental problem with the proposed language is that it includes the "certification" of the project as the triggering event for starting the clock on possible revocation. DENA respectfully suggests that the appropriate trigger for determining a developer's due diligence should be the developer's actions once the project's certification and the accompanying project permits are final and no longer subject to administrative appeal or judicial review.

process. Revocation of the license would nullify the investment made by all parties, including the State.

- **The Threat of License Revocation Jeopardizes Project Financing**. Project developers typically finance projects post certification through third-party lenders. In order to receive financing, the project owner must convince the lender that the project will be built. The threat of license revocation is a substantial threat to project financing – even if that threat is seen by some as remote. Any threat means that the cost of project financing will increase. Threat of imminent revocation of a license will make financing more costly. If the threats are draconian, they may make project financing unattainable, resulting in the need to terminate an uneconomic project. The threat of revocation is a cloud over project financing.

- **There Is Absolutely No Money To Be Made By Licensing A Project That Is Never Built**. There is simply no money in licensing a project that is never built. Indeed, there is a substantial cost to any developer in securing a license. Developers need no incentive to capitalize on their investments in a Commission license.

- **There Has Been No Showing That There Are "Finite" Resources Being Impacted By Licensed Projects**. DENA rejects the suggestion that there are limited or finite resources that are being "tied up" by licensed projects that are not being built. The stories of purported shortages are, at best, anecdotal. There is no record in this proceeding, or in any Commission proceeding, that supports such a theory of finite resources negatively impacting project development. Rather than relying on anecdotal evidence, the potential negative impacts of acting imprudently dictate that the Commission should not act without strong evidence in a sound administrative record.[2]

- **It Is Unclear Whether The Commission Has The Legal Authority To Implement The Proposed Changes To Section 1720.3.** DENA respectfully suggests that there are serious legal questions that must be asked and answered before the Commission proceeds. At least five separate legal issues should be examined as part of the Commission's public process.

    - First, in analyzing the extent of the Commission's legal authority to promulgate the suggested changes to Section 1720.3, one should look to the "NOTE" with the purported statutory authorities for such changes. Specifically, Sections 25213, 25218(e) and 25541.5 are all general statutory provisions. The general statutory provisions cited are not specific to the question of the duration of, or the possible

[2] Even assuming, arguendo, that some such finite resources are somehow implicated, the Commission cannot and should not attempt to use the threat of license revocation to shape or dictate statewide water and air policy. DENA believes that the evidence developed during a detailed and open public process would be decidedly contrary to the anecdotal evidence regarding finite resources; that is, there is place where powerplant licenses have created a shortage of water supply or air emission credits that have precluded other powerplant developers from proceeding with an application. Nevertheless, if the Commission wants to examine the relationship, if any, between powerplant licensing and statewide water and air policy, it should do so in an open and direct manner, in consultation with CARB, state water resource agencies, and other responsible agencies -- not alone under the guise of threatened license revocation.

revocation of, the Commission's certification. The nexus between these general statutory statements of intent and the proposal for license revocation is profoundly unclear.

- Second, as proposed, Section 1720.3 focuses largely on "operation" of projects and operation deadlines. The Warren-Alquist Act itself does not include requirements for "on line dates." Indeed, the Commission only recently entertained the concept of a mandatory date for commercial operations as part of peaker programs during the 2001's declared State of Emergency. Given the Warren Alquist Act's silence on the issue of on-line dates and given the end of the Gubernatorially declared State of Emergency on December 31, 2001, the Commission's statutory authority to promulgate such regulations is questionable.

- Third, as acknowledged at the hearing, the Committee's entire efforts in this proceeding would be mooted if legislation on this subject is passed during this session. Specifically, legislation along the lines of SB 86XX from the recently closed Second Extraordinary Session may or may not be considered during the remainder of the Regular Session. While not dispositive, the mere fact that legislation has been contemplated in this area is some evidence that the Commission has no existing statutory authority to proceed with Section 1720.3 as proposed.

- Fourth, even assuming that the proposal passed statutory and Constitutional muster, there are substantial questions regarding the application of any revised regulations to licensed projects and projects in the licensing process prior to any action by the Commission. These issues should be examined.

- Fifth, assuming the Commission does amendment Section 1720.3, any amendments cannot and should not be applied retroactively to projects that have already filed Applications for Certification. Applications that have been filed under the existing rules must be subject to existing rules.[3]

- **Informal vs. Formal Complaints, Sections 1230 *et seq.***: As stated at the May 1, 2002, hearing, DENA supports the concept of a streamlined review of potential complaint actions. While it is the Committee's intent to have one administrative process, DENA believes that the language of Section 1230.5, as proposed, would lead to two, duplicative appeals: (1) an informal appeal, resulting in a ruling that would be appealable to the full Commission; and (2) a formal appeal, resulting in a ruling that would be appealable to the full Commission. At the May 1, 2002 hearing, the Committee and Staff appeared to be in agreement with DENA on the concept of a single appeal that avoids duplicative proceedings. Staff further stated that new language clarifying the Committee's intent would be forthcoming. DENA will review and comment upon the revised language.

[3] Given the long lead times associated with securing a site, preparing and AFC and obtaining data adequacy, the Committee should consider making any changes effective six months after the proposed regulations are no longer subject to judicial and administrative appeals. This later effective date would grand fathering projects that are currently being prepared under the existing regulations.

CONCLUSION

Uncertain market conditions and a politically charged environment in Sacramento, among other factors, have greatly destabilized California energy markets. DENA respectfully suggests that stability and certainty dictate that the Commission not proceed with this rulemaking at this time.

Sincerely,

Jeffery D. Harris
Christopher T. Ellison
Ellison, Schneider & Harris, LLP
Attorneys for the DukeEnergy North America